Supreme Court, U.S.
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No. 97-1756

In The

Supreme Court of the United States

October Term, 1997

JEFFREY KENDALL,

Petitioner,

v.

BARBARA KENDALL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

RESPONDENT BARBARA KENDALL'S BRIEF IN OPPOSITION

FOR RESPONDENT BARBARA KENDALL:
DAVID E. CHERNY, ESQUIRE
Counsel of Record
PETER A. KUPERSTEIN, ESQUIRE
ATWOOD & CHERNY
211 Commonwealth Avenue
Boston, Massachusetts 02116
(617) 262-6400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of the United States has jurisdiction to consider whether independent appellate review was to be applied by the Supreme Judicial Court of the Commonwealth of Massachusetts in *Kendall v. Kendall*, and if so, whether the *Kendall* court properly applied the clearly erroneous standard.

II. Whether the trial court properly limited a litigant's individual liberties under the free exercise clause and establishment clause of the United States Constitution in a Judgment of Divorce by restricting the litigant from exposing the children to limited aspects of his religion in order to promote the best interests of the children.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

CITATION TO OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

SUMMARY OF ARGUMENT 11

REASONS WHY JEFFREY P. KENDALL'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 13

I. THE SUPREME COURT OF THE UNITED STATES DOES NOT HAVE JURISDICTION TO CONSIDER PETITIONER'S CLAIM THAT APPELLATE COURTS MUST EXERCISE INDEPENDENT APPELLATE REVIEW OVER CONSTITUTIONAL FACTS IN CASES INVOLVING EXERCISE OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF RELIGION 13

A. The Supreme Judicial Court of the Commonwealth of Massachusetts Properly Applied the "Clearly Erroneous" Standard of Review in *Kendall v. Kendall* 15

B. The Supreme Judicial Court of the Commonwealth of Massachusetts' Decision in *Kendall v. Kendall* Would Have Similar Results if Independent Appellate Review Was Used 16

TABLE OF CONTENTS – Continued

Page

II. THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS' DECISION IN *KENDALL V. KENDALL* IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT 17

CONCLUSION 22

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 13, 14

Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) 15, 16

Anderson v. Bessemer City, 470 U.S. 364 (1985) 15

Chandler v. Bishop, 702 A.2d 813 (N.H. 1997) 19

Felton v. Felton, 383 Mass. 232, 418 N.E.2d 606 (1981) 19, 20

Funk v. Ossman, 150 Ariz. 578, 724 P.2d 1247 (1986) 19

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 19

Harris v. Harris, 343 So. 2d 762 (Miss. 1977)..... 19

In re Green, 448 Pa. 338, 292 A.2d 387 (1972)..... 19

In re Marriage of Short, 698 P.2d 1310 (Colo. 1985) 19

Kendall v. Kendall, 426 Mass. 238, 687 N.E.2d 1228 (1997) ..... *passim*

Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715 (1988) 16, 19

Kirchner v. Caughey, 326 Md. 567, 606 A.2d 257 (1992) 19

Larson v. Valente, 456 U.S. 228 (1982)..... 21

LeDoux v. LeDoux, 234 Neb. 479, 452 N.W.2d 1 (1990) 16, 19, 20

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 18

Munoz v. Munoz, 489 P.2d 1133 (Wash. 1971) 19

TABLE OF AUTHORITIES – Continued

Page

New York v. Ferber, 458 U.S. 747 (1982) 19

Osteraas v. Osteraas, 859 P.2d 948 (Idaho 1993)....19, 20

Pater v. Pater, 588 N.E.2d 794 (Ohio 1992)..... 19

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 18

Prince v. Massachusetts, 321 U.S. 158 (1944) 18, 19

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 16

Reynolds v. United States, 98 U.S. 145 (1878) 18

Sherbert v. Verner, 374 U.S. 398 (1963) 18

United States v. McConney, 728 F.2d 1195 (1984)..... 16

Waites v. Waites, 567 S.W.2d 326 (Mo. 1978) 20, 21

Welker v. Welker, 24 Wis.2d 570, 129 N.W.2d 134 (1964) 16, 20

Wisconsin v. Yoder, 406 U.S. 205 (1972).... 12, 16, 18, 19

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.....2, 15, 18

STATUTES

28 U.S.C. § 1257.....1, 11, 14

MASS. GEN. L. ch. 208, § 1B (1998) 3

RULES OF CIVIL PROCEDURE

Sup. Ct. R. 10(b) 18

Mass. R. App. P. 16 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1267 (1996) 15

Leo Trepp, *The Complete Book of Jewish Observance*, 55 (1980) 6

CITATION TO OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 426 Mass. 238, 687 N.E.2d 1228 (1997). The Supreme Judicial Court's decision is reproduced in Appendix 1-20 in Jeffrey Kendall's Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in *Kendall v. Kendall* was entered on December 9, 1997. The Supreme Judicial Court of the Commonwealth of Massachusetts denied a petition for rehearing on January 27, 1998 without opinion.

The Supreme Court of the United States is without jurisdiction to consider whether the Supreme Judicial Court of the Commonwealth of Massachusetts should have applied independent appellate review pursuant to 28 U.S.C. § 1257.

The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1257 to consider whether the Supreme Judicial Court of the Commonwealth of Massachusetts properly limited the Petitioner's constitutional liberties in a Judgment of Divorce by restricting him from exposing the children to limited aspects of his religion to promote the best interests of the children.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Nature of the Case

The custodial disputes involved in this case arise from a religious conflict between the parties: Barbara Zeitler-Kendall (hereinafter referred to as "the Respondent") is an Orthodox Jew while Jeffrey P. Kendall (hereinafter referred to as "the Petitioner") is a born-again Christian. Each party wishes to raise their three children according to their religious beliefs. The children, who have been raised in a Jewish household, have Jewish names and a Jewish cultural identity, are experiencing emotional distress because of their exposure by the Petitioner to certain aspects of his religion, which attempts to teach them, *inter alia*, that in order to be "saved," they must accept Jesus Christ. These teachings contradict their Jewish ethnicity, and forces them to regard their mother as someone doomed to hell and place them in the unenviable position of having to regard choosing between religions as choosing between their parents.

At trial, the lower Court heard testimony regarding the religious conflict between the parties and the emotional distress suffered by the children – and properly entered a judgment limiting the Petitioner's ability to expose the children to his religion which promotes rejection, rather than acceptance of the Respondent and the children's own Jewish self-identity.

The Petitioner has appealed this aspect of the judgment as well as the standard of review the Supreme Judicial Court of the Commonwealth of Massachusetts used in reviewing the lower court's judgment.

B. Procedural History

The Petitioner and the Respondent were married on April 24, 1988. (App. 31). The parties have three children: Ariel, born on October 10, 1988; Moriah, born on May 19, 1991; and Rebekah, born on April 21, 1993. (App. 31).

On November 22, 1994, the Respondent filed a Complaint for Divorce with the Norfolk Probate and Family Court, Commonwealth of Massachusetts, pursuant to MASS. GEN. L. ch. 208, § 1B (1998). In her complaint she sought, *inter alia*, custody of the parties' three minor children. Subsequently, on December 6, 1994, the Petitioner answered the Respondent's complaint and similarly requested, *inter alia*, custody of the parties' children.

On December 9, 1994, the parties entered into a stipulation, which was incorporated into a Temporary Order, where, in relevant part, they agreed that: the Respondent would have temporary physical custody of the children;

the Petitioner would have liberal visitation rights during the week; and neither party would make derogatory remarks about the other parent or their respective religion. The court further provided that the Petitioner would have visitation rights every other weekend from Saturday at sundown to Sunday at 6:00 p.m.

Throughout the pending divorce, the Respondent attempted to modify the order as it related to weekend visitation and access to the children. The Petitioner sought to have additional visitation with the children over the weekend, and desired to expose the children to his Christian religious beliefs.

On September 28, 1995, the Respondent filed a Motion to Appoint a Guardian Ad Litem. The court (Harms, J.) allowed Respondent's motion, and on October 12, 1995, appointed Dr. Michael Goldberg to "address the inter-religious conflict between the parties." (App. 30).

Following a five day trial, the court (Harms, J.) issued Findings of Fact and Conclusions of Law (App. 30) and a Judgment of Divorce Nisi (App. 23). The court's judgment provided, in pertinent part, that:

1. The parties shall have joint legal custody of the children. (App. 23, ¶ 1).

2. Each parent shall be entitled to share his/her religious beliefs with the children with restrictions as follows: neither may indoctrinate the children in a manner which substantially promotes their rejection of their Jewish ethnic and religious identity, or promotes their alienation from either parent or their rejection of either parent. The [Respondent] shall not take the children to his

> church (whether to church services or Sunday School or church educational programs); nor engage them in prayer or bible study *if it promotes rejection, rather than acceptance, of their mother or their own Jewish self-identity*. The [Respondent] shall not share his religious beliefs with the children *if those beliefs cause the children significant emotional distress or worry about their mother or about themselves*. (App. 25, ¶ 5). **(Emphasis supplied)**

The Petitioner timely claimed appeals from the relevant rulings. The Petitioner, however, failed to address the issue regarding which standard of review should be applied.

The Supreme Judicial Court of the Commonwealth of Massachusetts granted the Petitioner's application for direct appellate review. The case was argued on October 7, 1997, and a decision was rendered on December 9, 1997. The Petitioner thereafter, filed a Petition for Rehearing on December 23, 1997, asserting, for the first time, that the court was to apply independent appellate review.

The Petition for Rehearing was denied on January 27, 1998 without opinion.

The decision of the Supreme Judicial Court upheld the rulings of the Trial Judge.

STATEMENT OF FACTS

The Respondent and the Petitioner were married on April 24, 1988. (App. 31). Although the Respondent was

Jewish and the Petitioner a non-practicing Roman Catholic, the couple were married in a traditional Jewish wedding ceremony. (App. 33). The parties specifically agreed that their children would be raised with a Jewish identity and in a Jewish home. (App. 33, 34).

The parties' children were given traditional Jewish names and formal Jewish ceremonies, which the Petitioner participated in. (App. 33). The parties celebrated the Sabbath on Friday nights and celebrated Jewish high holidays together. (App. 34). Since the birth of the first child, the Respondent and the children attended a "Jewish family camp" for a week each year, and the Petitioner joined them on several occasions. (App. 34).

In 1994, the Respondent decided to attend an Orthodox synagogue and adhere to Orthodox teachings. (App. 35). The children attended the Orthodox synagogue with the Respondent. As a result, the parties maintained a "kosher"[1] household; observed "shabas" weekly from Friday at sundown to an hour after sundown on Saturday; and, did not work or travel by car on shabas. (App. 34). The children also adhered to the Jewish Orthodox traditions and the family celebrated shabas and all religious holidays. Ari began wearing "payes" (long side burns worn by Orthodox Jews), a "kipah" (yarmulke), and "tzitzit" (a religiously significant garment with four

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[1] The term kosher (kashrut) denotes a universe of laws, rules, and regulations and their observance in a manner that is in accordance with tradition. Kashrut transforms the act of nourishment into a celebration of the spirit and the body into a vessel of the divine. Leo Trepp, *The Complete Book of Jewish Observance*, 55 (1980).

long strands that are knotted) on a daily basis. Additionally, the children were enrolled in a private Jewish school. The Petitioner did not object to enrolling the children in the Jewish school.

The Petitioner began attending Bible study classes of the Boston Church of Christ (a Fundamental Christian Church) in October of 1990. (App. 34). His growing involvement with the Boston Church, which included Sunday services (taking up to a half-day) and weekly Bible studies (up to three nights a week), as well as nightly activities, began to cause strain on the marital relationship. (App. 34-36).

In particular, based on the Boston Church of Christ's directive to proselytize, the Petitioner began requesting that Respondent embrace his faith. The Petitioner similarly began attempting to share his new found faith with his children as well and wanted to bring the children to church. (App. 36-37).

The Petitioner believes, that in order to have a "right relationship" with God, one must adopt Jesus Christ as their personal savior, otherwise, that person will go to hell. (App. 34-35). According to the Guardian Ad Litem's[2] report, the Petitioner believes that people who do not believe in Jesus Christ will go to "eternal punishment, the second death which is separate from God for eternity." (App. 100).

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[2] The guardian ad litem, a well respected psychiatrist specifically experienced in the area of inter-religious conflict, prepared an extensive independent evaluation. He filed with the trial court an extensive report, and also testified at length subject to cross examination by the Petitioner.

In September, 1994, the couple separated. Over the Respondent's objections, the Petitioner continued to expose the children to the Boston Church of Christ. The Petitioner admitted that "he will do what the Bible says to help [the children be saved]," and stated to the Guardian Ad Litem that he "would never stop trying to convert the children." (App. 36).

In support of these pursuits and ideals, the Petitioner has read to his children scriptures from the Bible; used the Bible to teach them; prayed with the children invoking Jesus Christ's name; brought the children to church services; and allowed the children to watch videos with Christian themes. At these services, the children have been exposed to the belief that nonbelievers, i.e. persons such as their mother, are doomed to hell. (App. 100). Moreover, the Petitioner has expressed to the children that the Respondent will go to hell if she does not convert to the beliefs of the Boston Church of Christ. (App. 100). At the same time as the Petitioner was exposing the children to Christian beliefs, he objected to the children's celebrating the Sabbath.

The Petitioner has not merely exposed the children to a different spiritual viewpoint; he has taken affirmative, hostile steps to erode the children's Jewish identity by tearing down the spiritual accouterments of their religion. For example, in the summer of 1995, Ari wore payes. The Petitioner took steps to shave Ari's head so he could have a "mohawk". The Respondent specifically demanded that the Petitioner not cut Ari's hair, but the Petitioner disregarded the Respondent's pleas, obtained the appropriate tools and cut Ari's hair in the Respondent's presence. (App. 21).

In the fall of 1994, (in furtherance of his Orthodox Jewish identity) Ari began wearing tzitzit. The Petitioner noticed that Ari was wearing the tzitzit and stated to Ari several times, in an angry, threatening voice, "Take those off or I am going to cut them off." The Guardian Ad Litem and the court found this incident to be reflective of the Petitioner's intolerance of the children's religion and aptly demonstrated the conflict faced by the children. The evidence at trial of harm to the children rests on Dr. Goldberg's report. The Guardian Ad Litem, as outlined in his report, interviewed the Respondent, the Petitioner, the children, as well as the children's teachers. Based on the Guardian Ad Litem's observations of the religious conflict (summarized above) the Guardian Ad Litem concluded that it was in the children's best interest not to be exposed to the Petitioner's religion. (App. 136).

Dr. Goldberg's report and testimony (which were largely adopted by the court) compels the finding that continued exposure to the Petitioner's religion will have a deleterious effect on the children and undermine their custodial relationship with their mother. In sum, Dr. Goldberg determined that:

1. A custody plan that requires the parents to make joint decisions will likely result in excessive and persistent hostility and conflict to which the children are likely to be exposed. (App. 117).

2. The Petitioner exposes the children to religious experiences and practices that he knows may have detrimental effects on the children. (App. 121).

3. The Petitioner behaves in this manner in order to save the children from eternal punishment. (App. 121).

4. Without determining whether either parties' religion is right or wrong, the Petitioner's behavior has a potentially negative impact on the children. (App. 123).

5. Although Ari's experiences do not meet criteria for formal psychiatric diagnosis, he is emotionally distressed by his need for the Petitioner's affection and his desire to maintain his Jewish identity. (App. 122).

6. In light of this conflict, Ari has suffered a decline in his motivation and academic conduct. (App. 122).

7. Moriah too is experiencing emotional distress. (App. 123).

8. Both Ari and Moriah perceive themselves as being Jewish. (App. 125-126).

9. Rebekah is too young to have formed a Jewish identity, although given the fact that Rebekah will most likely reside with the Respondent, she will develop such an identity. (App. 126).

10. Ari's belief system (and Rebekah and Moriah's once they further develop Jewish concepts) will allow him to accept the Petitioner without needing to change him. (App. 127).

11. If, however, the children accept the Petitioner's religious views, they will view the Respondent negatively. This view will have a negative impact on their relationship with the Respondent. (App. 127).

12. If the children develop a negative view of the Respondent or reject her beliefs they may suffer hostility and rejection from the Respondent. If this were to occur the children may resent the Petitioner for undermining their relationship with the Respondent. Thus, the children would not have good relationships with either parent. (App. 127-128).

13. The Petitioner's behavior fosters negative and distorted images of Jewish culture. (App. 130).

14. The Petitioner's actions force the children to choose between their parents. (App. 131).

Based on these facts, Dr. Goldberg concluded that "the court is encouraged to consider a plan that permits the non-custodial parent to maintain their relationship with the child in a manner that does not promote their rejection of aspects of their own ethnic, cultural, and religious identity or promote their alienation from the primary custodial parent and the related difficulties discussed above." (App. 136).

SUMMARY OF ARGUMENT

The Supreme Court of the United States is without jurisdiction to consider whether the Supreme Judicial Court of the Commonwealth of Massachusetts should have applied independent appellate review pursuant to 28 U.S.C. § 1257. Nonetheless, the court properly applied

the clearly erroneous standard, similar to other courts of last resort.

The Supreme Judicial Court's decision in *Kendall v. Kendall* properly held that the lower court's limited prohibition of the Petitioner from exposing the children to selected aspects of his religion are supported by the evidence and comply with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as well as courts of last resort. The trial court appointed a qualified Guardian Ad Litem, who examined the parties' religious conflict and found that exposure to the Petitioner's religion is detrimental to the children.

Moreover, because the lower court's rulings are based on an affirmative showing of harm to the children, the court's orders comply with constitutional guidelines. The orders are narrowly tailored and do not unduly burden the Petitioner's right to practice his religion; rather, the orders only limit the Petitioner from exposing the children to aspects of his religion that were causing affirmative harm to the children. The court did not create an ethnic identity for the children. The court merely acknowledged the preference that the parties allowed to develop, and one which the Petitioner, until recently, encouraged.

Additionally, the court's limitation of the children's exposure to the Petitioner's religion was intended for a wholly secular purpose; to limit the emotional harm to the children which was caused by exposure to the negative messages of the Petitioner's religion. Despite the Petitioner's assertion, the case at bar is simply a court

focusing on the best interests of the parties' children rather than the Petitioner's religion.

REASONS WHY JEFFREY P. KENDALL'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE SUPREME COURT OF THE UNITED STATES DOES NOT HAVE JURISDICTION TO CONSIDER PETITIONER'S CLAIM THAT APPELLATE COURTS MUST EXERCISE INDEPENDENT APPELLATE REVIEW OVER CONSTITUTIONAL FACTS IN CASES INVOLVING EXERCISE OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF RELIGION.

The Supreme Court of the United States does not have jurisdiction to address whether the Supreme Judicial Court of the Commonwealth of Massachusetts was to apply independent appellate review in *Kendall v. Kendall,* 426 Mass. 238, 687 N.E.2d 1228 (1997). 28 U.S.C. § 1257. The Petitioner contends that the Supreme Judicial Court improperly reviewed the case at bar under a "clearly erroneous" standard rather than an "independent appellate review" standard. (Petitioner Brief, pp. 8-14).

The Supreme Court of the United States may not review a final judgment of a state court unless the issue was properly raised. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549-50 (1987). Massachusetts Rules of Appellate Procedure 16 required the Petitioner to present in his brief all legal issues and if not properly raised, it was deemed waived. Mass. R. App. P. 16. The Petitioner failed to address the issue regarding independent appellate review to the Supreme Judicial

Court of the Commonwealth of Massachusetts. The Petitioner raised the present issue for the first time in his Petition for Rehearing, which was denied without opinion. (App. 60). Similarly, in *Board of Directors of Rotary Int'l*, this Court refused to review an issue not properly presented to the state court where:

> [a]ppellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The Court denied the petition without opinion. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Board of Directors of Rotary Int'l*, 481 U.S. at 550.

In the present case, the Petitioner has failed to make such a showing.

Further, as evidenced in the Petitioner's present Petition for Writ of Certiorari (App. 10), there is no established precedent that supports his contention that the Massachusetts Supreme Judicial Court was required to apply independent appellate review in the case at bar and; thus, this was clearly a legal issue that should have been addressed to the Supreme Judicial Court of the Commonwealth of Massachusetts. Accordingly, this Court is without jurisdiction pursuant to 28 U.S.C. § 1257 to consider the Petitioner's claim regarding independent appellate review.

A. The Supreme Judicial Court of the Commonwealth of Massachusetts Properly Applied the "Clearly Erroneous" Standard of Review in *Kendall v. Kendall.*

Despite the respondent's broad reading of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court did not indicate it was re-defining the clearly erroneous rule nor did it indicate it was drawing a line for "special facts . . . deemed to have constitutional significance" such as cases involving Exercise of the First Amendment Right to Freedom of Religion. *Bose*, 466 U.S. at 505; *see also* Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1267 (1996). Nor has this Court invoked *Bose* in this broad way. *Cf. Anderson v. Bessemer City*, 470 U.S. 364, 573-76 (1985) (Title VII, not citing *Bose*).

Rather, in First Amendment cases, this Court has held that independent appellate review is required only in cases implicating "restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Bose* at 503. These cases have included libelous speech, fighting words, incitement to riot, obscenity, and child pornography. *See Bose*, 466 U.S. at 504 (citing cases). Yet, this Court has never required independent appellate review over cases involving the First Amendment Right to Freedom of Religion.

Further, issues concerning mixed questions of law and fact in which the applicable legal standard requires for a strictly factual test involves an "essentially factual

inquiry." *United States v. McConney*, 728 F.2d 1195, 1203 (1984) (*citing Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Similar to the *Kendall* Court, courts of last resort, prior to and since *Bose*, have uniformly used the clearly erroneous standard in reviewing a lower court's restriction over a parent's religion to ensure a child's best interests. *See e.g., LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990); *Khalsa v. Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988); *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134 (1964).

Moreover, as discussed *supra*, the Supreme Court of the United States held that, in areas of religious upbringing, a parent's individual liberties may be constitutionally restricted upon a showing of substantial threat of harm to a child's health. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Therefore, the best interest of the child standard trumps the constitutional issues involved, mandating courts to apply the "clearly erroneous" standard.

B. The Supreme Judicial Court of the Commonwealth of Massachusetts' Decision in *Kendall v. Kendall* Would Have Similar Results if Independent Appellate Review Was Used.

In the case at bar, the Respondent was "required to demonstrate in detail that exposure to [the Petitioner's] religion caused the children substantial injury, physical or emotional, and [would] have a like harmful tendency for the future." (App. 7-8). If the Supreme Judicial Court of the Commonwealth of Massachusetts had applied independent appellate review, the court would have come to

the same conclusion; that substantial harm to the children was properly demonstrated.

For example, the Guardian Ad Litem found, in relevant part: "[The Petitioner] threatened to cut the fringe off Ariel's tzitzitz if he did not tuck it inside his pants. This greatly upset Ariel . . . " (App. 11); " . . . Ari has drawn from the above teaching the conclusion that [the Respondent] may go to hell, and that this causes him substantial worry and upset." (App. 12); " . . . Ari . . . is emotionally distressed by the conflict . . . there has been a decline in his motivation and academic performance." (App. 13); " . . . Moriah is experiencing emotional distress related to the parental conflict . . . " (App. 14). Clearly, the lower court's findings were beyond conjecture. The Guardian Ad Litem presented, and the Supreme Judicial Court of the Commonwealth of Massachusetts correctly found, that there was sufficient evidence (including independent psychological findings) demonstrating that the children experienced physical and emotional harm as a result of their exposure to the Petitioner's religious teachings

II. THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS' DECISION IN *KENDALL V. KENDALL* IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

Jeffrey P. Kendall's petition for Writ of Certiorari should be denied as the Supreme Judicial Court's decision in *Kendall v. Kendall*, 426 Mass. 238, 687 N.E.2d 1228 (1997) is not in conflict with the reported decisions of

other courts of last resort. Sup. Ct. R. 10(b). To the contrary, those courts having ruled upon the issues at bar have uniformly upheld, as did the Supreme Judicial Court of the Commonwealth of Massachusetts in this case, the constitutionality of limiting an individual's liberties in order to promote the best interests of a child.

The Supreme Court of the United States has stated that the twofold concept of the Free Exercise Clause provides that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" and that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty." *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

Although the First Amendment confers upon individuals the right to free exercise of religion without state interference, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) and that parents have a fundamental right to control their children's religious education free from unreasonable state intervention, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the United States Constitution allows limitations on individual liberties where a compelling interest exists. *Wisconsin*, 406 U.S. at 230; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). In addition, the state under the parens patriae doctrine, has a duty to protect a child's well-being. *Wisconsin*, 406 U.S. at 220; *Prince*, 321 U.S. at 166-67. This duty and authority is "not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." *Prince*, 321 U.S. at 166-67.

It has been well established by this Court that promoting the best interests of a child is a compelling interest sufficient to curtail the individual liberties of the child's parents. *Prince*, 321 U.S. at 166-67. This Court has also held unequivocally that a state has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Specifically, in matters of religious upbringing, a parent's individual liberties may be constitutionally restricted upon a showing of substantial threat of harm to the physical and mental health of the child. *Wisconsin*, 406 U.S. at 230.

Accordingly, courts of last resort that have addressed the same issue at bar are in accord that to constitutionally restrict a parent from exposing his or her religious practices to the minor child, there must be a clear, affirmative showing of harm caused by exposure to the religious practices of that parent. *Chandler v. Bishop*, 702 A.2d 813 (NH 1997); *Osteraas v. Osteraas*, 859 P.2d 948 (Idaho 1993); *Kirchner v. Caughey*, 326 Md. 567, 606 A.2d 257 (1992); *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992); *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990); *Khalsa v. Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988); *Funk v. Ossman*, 150 Ariz. 578, 724 P.2d 1247 (1986); *In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985); *Felton v. Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *Harris v. Harris*, 343 So. 2d 762 (Miss. 1977); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972); *Munoz v. Munoz*, 489 P.2d 1133 (Wash. 1971).

In *Felton v. Felton*, the Supreme Judicial Court of the Commonwealth of Massachusetts aptly recognized that in situations where custody is contested because of religious

issues, an independent investigator should be appointed to present to the trial court unbiased facts. *Felton v. Felton*, 383 Mass. 232, 242, 418 N.E.2d 606, 611 (1981). *See also LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990) (barring father from exposing children to teachings of Jehovah's Witnesses based on testimony from a certified clinical psychologist).

In this case, the trial court assured constitutional safeguards by appointing a qualified Guardian Ad Litem to examine the religious conflict between the parties. *Felton, supra* at 242, 418 N.E.2d at 611. The Guardian Ad Litem interviewed the parties, the children, and the children's teachers and issued a comprehensive 37 page report. (App. pp. 74-138).

The Guardian Ad Litem's report, does not contain general allegations of "confusion" or false cries of "harm." Rather, interviews with the children reflect the fact that the children's exposure to aspects of the Petitioner's religion causes the children emotional turmoil and physical overt manifestations of this conflict.

In addition, because the state has a compelling interest in protecting a child, the Establishment Clause does not prevent courts from considering religion when one parent's religious practices caused emotional or physical harm to the child. *Osteraas v. Osteraas*, 124 Idaho 350, 859 P.2d 948 (1993); *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978); *Welker v. Welker*, 24 Wis. 2d 570, 576, 129 N.W.2d 134, 138 (1964).

In the case at bar, the trial court did not establish Judaism as the religion to govern the children's upbringing. Rather, the court simply recognized the preference of

religion that the Petitioner and the Respondent allowed to develop and which the Respondent had encouraged prior to his involvement with the Boston Church of Christ. The trial court's order was wholly secular, intended not to favor a religion, but instead, to limit the emotional harm to the children caused by exposure to the Petitioner's religious teachings. The order also does not foster excessive government entanglement by simply allowing any judicial inquiry to center on the emotional harm to the children.

There is a vast difference between a court concentrating on the religious choice of a parent as compared to concentrating on the best interests of a child. This difference is not superficial, but rather fundamental. Although a court may not favor or prefer a religion, a court must favor the best interests of a child. *See Waites v. Waites*, 567 S.W.2d 326, 333 (1978).

Additionally, it is well established by this Court that the Establishment Clause requires laws which grant denominational preferences to be justified by a compelling governmental interest and must be narrowly drawn to further that interest. *Larson v. Valente*, 456 U.S. 228, 247 (1982). In the case at bar, the governmental interest in promoting the best interests of the child was narrowly tailored. The court's prohibitions are the least intrusive means of limiting the Petitioner's religious rights. The Petitioner is not precluded from attending church; rather, the limitation is on the Petitioner's ability to expose the children to concepts which undermine their ethnic heritage or cause them to reject the Respondent, all in keeping with a promotion of the best interests of the children. In fact, the court's order allows the Petitioner to take the

children to Sunday School, so long as he tape records the classes (for later review if necessary).

The Supreme Judicial Court of the Commonwealth of Massachusetts' decision in this case was consistent with the decisions of other courts of last resort which have ruled on these issues.

CONCLUSION

For the aforementioned reasons, Respondent requests that this Honorable Court deny Jeffrey Kendall's Petition for Writ of Certiorari.

Respectfully submitted,

DAVID E. CHERNY, ESQUIRE
Counsel of Record
PETER A. KUPERSTEIN, ESQUIRE
ATWOOD & CHERNY
211 Commonwealth Avenue
Boston, Massachusetts 02116
(617) 262-6400

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APPENDIX

MASSACHUSETTS GENERAL LAWS.

Chapter 208.

§ 1B. Irretrievable breakdown of marriage; commencement of action; waiting period; unaccompanied complaint; procedure

An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced by the filing of the complaint unaccompanied by the signed statement and dissolution agreement of the parties required in section one A.

No earlier than six months after the filing of the complaint, there shall be a hearing and the court may enter a judgment of divorce nisi if the court finds that there has existed, for the period following the filing of the complaint and up to the date of the hearing, a continuing irretrievable breakdown of the marriage.

Notwithstanding the foregoing, at the election of the court hereunder, the aforesaid six month period may be waived to allow the consolidation for the purposes of hearing a complaint commenced under this section with a complaint for divorce commenced by the opposing party under section one.

The filing of a complaint for divorce under this section shall not affect the ability of the defendant to obtain a hearing on a complaint for divorce filed under section one, even if the aforesaid six month period has not yet expired.

Said six month period shall be determined from the filing of a complaint for divorce. In the event that a

complaint for divorce is commenced in accordance with the provisions of section one A or is for a cause set forth under section one, and said complaint is later amended to set forth the ground established in this section, the six month period herein set forth shall be computed from the date of the filing of said complaint.

As part of the entry of the judgment of divorce nisi, appropriate orders shall be made by the court with respect to custody, support and maintenance of children, and, in accordance with the provisions of section thirty-four, for alimony and for the disposition of marital property.

Nothing in the foregoing shall prevent the court, at any time prior to judgment, from making temporary orders for custody, support and maintenance or such other temporary orders as it deems appropriate, including referral of the parties and the children, if any, for marriage or family counseling.

Prior to the entry of judgment under this section, in the event that the parties file the statement and dissolution agreement as required under section one A hereinabove, then said action for divorce shall proceed under said section one A.

SUPREME COURT RULES.

Part III – Jurisdiction on Writ of Certiorari

Rule 10. Considerations governing review on certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

. . . .

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

. . . .

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Rule 16 – Briefs

(a) **Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) In all briefs, a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case, which shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) The argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. In a brief with more than twenty-four pages of argument, there shall be a short summary of argument, suitably paragraphed and with page references to later material in the brief dealing with the same subject matter, which should be a condensation of the argument actually made in the body of the brief, and not a mere repetition of the headings under which the argument is arranged. The appellate court need not pass upon questions or issues not argued in the brief. Nothing argued in the brief shall be deemed to be waived by a failure to argue orally.